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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 368

MICHIGAN GAS AND ELECTRIC COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, MICHIGAN WISCONSIN PIPE LINE COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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1. Neither the Commission nor Mich Wis deny the general importance of the question presented as set out in the Petition. Instead, their principal contention in opposition to the granting of certiorari is that the Commission explicitly found that requiring Michigan Gas to take gas for the Upper Peninsula at the pipeline (Menominee) at the same rate paid by all other customers of Mich Wis receiving delivery over

branch lines constructed by Mich Wis in accordance with its branch-line extension practice[1] does not result in unlawful discrimination against Michigan Gas and the Upper Peninsula. Accordingly, they urge that the question as set out in the Petition is not in fact presented.

In so contending, both the Commission and Mich Wis set out various citations to the Commission's orders where the Commission assertedly made such findings. But, properly read, these citations and the bob-tailed excerpts quoted therefrom fall far short of containing the finding now claimed by the Commission and Mich Wis. To the contrary, when read in the context as used and obviously intended by the Commission at the time it issued these orders, these materials make clear, as pointed out in the Petition, that in issuing the orders here involved, the Commission had assumed that rejection of the alternatives suggested by Michigan Gas for elimination of the discrimination—the existence of which the Commission did not deny—terminated its duty under Section 4(b) to eliminate discrimination.[2] Indeed, if the Commission had in fact

[1] Under this practice, when the branch line is regarded as part of a "project", Mich Wis constructs it all the way to the city gate and provides city-gate delivery; otherwise, Mich Wis constructs the branch line part of the way to the city gate as determined by its so-called "10-cent" formula and provides delivery at the point where Mich Wis' construction terminates.

[2] Mich Wis concedes that such Commission action in these circumstances would constitute clear error (Mich Wis Br., pp. 14-15):

> Few would disagree with the proposition raised by Petitioner in its "Question Presented" that, when confronted with discrimination, the Commission's responsibility to eliminate that discrimination is not limited or measured by the suggestions of the parties.

found that there was no unlawful discrimination, there would have been no occasion for the extended discussion of Michigan Gas' suggestions for its elimination that appears in the Commission's orders.

While the excerpt reproduced by the Commission (Com. Br., p. 8) to the effect that

> Thus providing for purchases by Michigan Gas under the ACQ-1 Rate Schedule and construction by it of the necessary Upper Peninsula facilities does not discriminate against that Company,

would appear, when read in isolation, to support the Commission's present position, it should be noted that this language is used in the Commission's opinion as the concluding sentence of a paragraph which reads in its entirety as follows:

> We thus reject the two alternatives advanced by Michigan Gas. As to the ACQ proposal based on the 10-cent formula, apart from the question of whether we have authority to require Michigan Wisconsin to construct the facilities involved, in general this formula is applicable to relatively short laterals. The maximum distance Michigan Wisconsin has built under it in the past is a line some 17.5 miles long at a cost of approximately $300,000. Also, Michigan Wisconsin would invest some $2,377,194 in facilities in the line from Waupaca to Menominee for additional capacity solely to provide service to the Upper Peninsula. *Thus*, providing for purchases by Michigan Gas under the ACQ-1 Rate Schedule and construction by it of the necessary Upper Peninsula facilities does not discriminate against that company. (Italics supplied; footnote omitted)

In contrast to the impression created by the language as quoted by the Commission—an impression

sharply enhanced by the omission of any indication of prior excisions—this excerpt when read in context, is plainly nothing more than only one link in the fallacious chain of reasoning used by the Commission in this case.[3] Read as concluding sentence of the paragraph just set out, the excerpt quoted by the Commission, particularly the introductory "Thus", makes clear the Commission's invalid assumption that its duty with regard to the elimination of unlawful discrimination was discharged with rejection of these suggestions.

The other excerpts quoted by the Commission similarly do not contain the finding, explicit or otherwise, now claimed by the Commission. The context of "'reasonable requirement' (R. 435)" (Com. Br., p. 9) shows the same unwarranted assumption. The quotations from R. 375-376 and from R. 440 (Com. Br., pp. 8, 9) are both used in the Commission's opinion—in contrast to the purpose for which they are now cited—in connection with the Commission's reasons for selecting Michigan Gas over Michigan Consolidated to distribute the natural gas allocated for the Upper Peninsula. Indeed, to the extent that the Commission does treat the terms and conditions of service to the Upper Peninsula in these excerpts, the Commission indulged in the further erroneous reasoning that the willingness of the Mich Wis' sister company, Michigan Consolidated, to take the gas at Menominee at the ACQ-1 Rate justifies the imposition of the same terms

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[3] While Mich Wis' reproduction of this excerpt (Mich Wis Br., p. 12) contains asterisks to indicate an omission, it omits, in addition, the introductory, highly significant "Thus", thereby distorting even more the actual intent and meaning of the quoted language.

upon Michigan Gas without reference to whether unlawful discrimination results therefrom.[4]

The same confusion between the unlawful discrimination and Michigan Gas' alternative suggestions also permeates not only the opinion of the court below (see particularly the language quoted at Mich Wis Br., p. 12) but the Commission's effort in its brief filed in this Court to show that its asserted, but non-existent, finding of no unlawful discrimination is amply supported (Com. Br., pp. 9-12):

> As to [Michigan Gas'] proposal that Michigan Wisconsin should construct a pipeline from Menominee north, either to the Upper Peninsula communities or under the "10-cent" formula, the Commission found that this would unfairly burden Michigan Wisconsin's other customers. (Com. Br., p. 10)
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> * * *
>
> Similarly, with respect to petitioner's alternative proposal that, if it were to take delivery at Menominee, it should pay less than the standard ACQ-1 rate paid by all other customers, the Commission found that this "would be discriminatory to Michigan Wisconsin's existing customers" (R. 377) * * * (Com. Br., p. 11)

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[4] The willingness of an affiliate of a pipeline company to acquiesce in discrimination patently does not justify the imposition of comparable discriminatory treatment upon a nonaffiliated smaller customer. For whereas in view of the intercorporate relationship, an affiliate's acquiescence in unlawful discrimination is totally offset by the benefits therefrom received by its sister, subjecting a nonaffiliated customer to comparable discriminatory treatment allows full scope for the abuses which the prohibition of discrimination was designed to eliminate. Cf. *Mississippi River Fuel Corporation* v. *Federal Power Commission*, 252 F. 2d 619, 622 (1957), certiorari denied, 355 U.S. 904 (1957).

As shown in the Petition (at p. 17), the rejection of Michigan Gas' suggestions for elimination of unlawful discrimination has no bearing upon the existence of unlawful discrimination—a matter separate and distinct from the question as to the proper steps to be taken to eliminate the discrimination. Accordingly, since the Petition clearly demonstrates that the Commission's order results in unlawful discrimination against the Upper Peninsula (Pet. pp. 14-16), it is apparent that the question as to the duty imposed upon the Commission by Section 4(b) of the Natural Gas Act to eliminate unlawful discrimination is in fact presented here.[5]

2. In urging against certiorari here, both the Commission and Mich Wis further claim that the question presented is one peculiarly with the Commission's expertise, particularly since the Commission's action was taken in a proceeding involving the issuance of a certificate of public convenience and necessity (Com. Br., pp. 9-10; Mich Wis Br., pp. 16-17). The difficulty with these arguments, however, is that they are premised on Respondents' unfounded claim,

[5] In other respects as well the Commission and Mich Wis have, by omission or otherwise, given a wholly unwarranted cast to the Commission's orders and the record evidence. Extended discussion of each of these would unduly extend this brief. Illustrative is their treatment of the Mich Wis-Michigan Gas negotiations prior to Mich Wis' filing its proposal to sell gas for the Upper Peninsula to its sister company, Consolidated. In summarizing these negotiations, the Commission and Mich Wis leave the impression that they were terminated upon Michigan Gas' rejection of Mich Wis' offer to provide city-gate delivery at a 52-cent rate (Com. Br., p. 4, fn. 1; Mich Wis Br., p. 5). The facts are, as shown in the Petition (at p. 6), that subsequent thereto, Mich Wis made a further offer of a 46-cent rate for city-gate delivery and Michigan Gas was on the verge of acceptance when the offer was abruptly withdrawn by Mich Wis.

just discussed, that the Commission found that there was no unlawful discrimination.

Moreover, the cases relied on by the Commission and Mich Wis are patently inapplicable. A Commission determination of the public convenience and necessity under Section 7(e) of the Act bears no resemblance to its failure to discharge the duty imposed upon it by Section 4(b) not to sanction unlawful discrimination. Whereas the public interest determination under Section 7(e) involves balancing of complex factors within the Commission's special expertise, none of these considerations are in any way relevant to the delineation, under Section 4(b), of the Commission's duty vis à vis unlawful discrimination. Cf. *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1960).

3. The Commission seeks to support its orders independently of the asserted finding of no discrimination by attempting to demonstrate that "because of differing geographical locations" its orders were reasonable and did not in fact result in unlawful discrimination against the Upper Peninsula (Com. Br., p. 12). On the same basis, the Commission also claims that the 1950 *Michigan Wisconsin* case[6] has no bearing in the present case (Com. Br., p. 13, fn. 6).

The claim that the higher costs of gas delivered in the Upper Peninsula is justified by the "extra costs of the additional mileage" needed to reach the Upper Peninsula (Com. Br., p. 13) ignores the hard facts of the operation of Mich Wis' pipeline system. There is no zoning or zone rates on the Mich Wis system. All of its customers pay the same

[6] *Michigan Wisconsin Pipe Line Co.*, 9 F.P.C. 127 (1950).

ACQ-1 rate and (other than Michigan Gas for the Upper Peninsula) receive delivery of their gas at the end of branch lines constructed by Mich Wis in accordance with Mich Wis' branch-line extension practice. This is the case *regardless of the customer's location on the Mich Wis system.* Indeed, many of these customers are substantially further from Mich Wis' sources of gas supply than is the Upper Peninsula from Marshfield where Mich Wis takes delivery of the Canadian gas from Midwestern. If the Commission's argument had any validity, these customers would also be required to pay the "extra costs of the additional mileage".

Nor do considerations of "geographical location" render the 1950 *Michigan Wisconsin* case inapplicable. In that case, the Commission did not even refer to, let alone place critical weight upon, the length of the branch lines involved. In addition, the Commission's basic holding there was simply that unlawful discrimination would result under Mich Wis' proposal that the same rate be paid for both pipeline and city-gate service. See 9 F.P.C. at 135. However, if the 1950 *Michigan Wisconsin* case were limited as now claimed by the Commission, the unlawful discrimination against the Upper Peninsula here would be all the more flagrant. If unlawful discrimination results from providing only pipeline service as against city-gate service where the customers receiving pipeline service would have to bear only comparatively slight additional costs to build the necessary branch lines (as the Commission claims it held in the 1950 *Michigan Wisconsin* case), then the obviously higher costs involved in the Commission's requirement that Michigan Gas construct and operate the extensive branch line needed to provide service

to the Upper Peninsula results in discrimination even more invidious against the Upper Peninsula.

4. Finally the Commission seeks to support its orders by quoting from its opinion as follows (Com. Br., p. 12):

> Finally, there are certain areas of this country which are situated in unfortunate geographical locations in relation to the availability of natural gas. It is no fault of these areas that they happen to be victims of geography. On the other hand, the existing customers can hardly be required to pay excessive costs just to make certain that the areas which are located a great distance from the source of supply may have the benefits of natural-gas service. The hard realities of such circumstances are that those areas must be willing to pay the costs associated with obtaining natural-gas service or be satisfied with other fuels which may be less desirable but which may be more economical to purchase than natural gas. (R. 377-378)

But, as already made clear, neither Michigan Gas nor the Upper Peninsula are asking the existing customers to pay *excessive* costs to assure service to the Upper Peninsula. Nor are Michigan Gas and the Upper Peninsula unwilling to pay the *reasonable* costs associated with natural gas service to that area. Michigan gas and the Upper Peninsula seek only *nondiscriminatory* treatment, i.e., treatment no worse as well as no better than that accorded other customers of Mich Wis.

As pointed out earlier, Mich Wis' other customers receive service over branch lines constructed for them by Mich Wis in accordance with its branch-line extension practice. Many of these customers are so situated

geographically or marketwise that, absent construction by Mich Wis of branch lines in accordance with its branch-line extension practice, they could not have had the benefits of natural gas service. As an existing customer of Mich Wis in its operations in the Lower Peninsula, Michigan Gas has, along with other customers of Mich Wis, borne the costs incurred by Mich Wis in constructing these lines without question. Michigan Gas asks no more with respect to service for the Upper Peninsula.[7]

Moreover, as the Commission found in *Michigan Wisconsin Pipe Line Co.*, 21 F.P.C. 552, 558 (1959), the very purpose of the branch-line extension practice was "to make possible laterals that would be infeasible for either party to construct entirely by itself". Here, contrary to Mich Wis (Mich Wis Br., p. 10), there is no finding by the Commission that the project is feasible for Michigan Gas if it alone were to incur the $8,000,000 cost of constructing the entire branch line from Menominee. In these circumstances, the effect of the Commission's order is to deny to Michigan Gas and the Upper Peninsular the means—inherent in Mich Wis' branch-line extension practice and provided for in Mich Wis' rates—for providing urgently needed

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[7] While, as pointed out by the Commission (Com. Br., p. 4) and Mich Wis (Mich Wis Br., pp. 8, 16) Mich Wis' share of the costs of the branch line to the Upper Peninsula would, under its 10-cent formula, have aggregated some 4.5 million dollars, the Commission's rejection of Michigan Gas' suggestion in connection therewith rendered that figure no longer meaningful. Until the Commission develops an appropriate formula for eliminating the unlawful discrimination, there is no way of ascertaining the cost to be borne by Mich Wis. Clearly, however, it will be less than 4.5 million dollars.

natural gas service to the Upper Peninsula on a basis entirely fair to all concerned.[8]

CONCLUSION

For these reasons as well as those set out in the Petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

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[8] Mich Wis further urges that the Commission's actions here are supportable under the provisions of Section 7(a) of the Act. The short answer to this argument is that inasmuch as the Commission did not rely upon Section 7(a) in issuing its orders, settled principles preclude affirmance based on that Section now. See, e.g., *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943). Section 7(a) is, in any case, inapplicable here for the reason, among others, that Mich Wis' application here expressly proposed to provide service to the Upper Peninsula and Michigan Gas did not apply for service under Section 7(a). Rather Michigan Gas, as an existing customer of Mich. Wis. intervened in opposition to the terms and conditions on which Mich Wis proposed to provide service in the Upper Peninsula. Hence, there is no question here as to an extension of service contrary to the wishes of the pipeline; rather the question concerns the terms and conditions on which to authorize a service proposed by the pipeline to an existing customer and as to such question, Section 4(b) prohibiting unlawful discrimination, not the proviso in Section 7(a), is controlling.